(15,570.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1186.

MRS. A. F. SIPPERLEY, MRS. E. J. WALLING, H. A. LEE, AND THE UNION BANK OF GREELEY, COLORADO, APPELLANTS,

vs.

JOHN O. SMITH, GEORGE WHITING, CHARLES F. CONNOR, AND GEORGE S. SMITH.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from district court	1	1
Complaint	1	1
Intervening complaint	3	2
Answer to intervening complaint	6	4
Findings of fact	8	6
Conclusions of law	17	12
Judgment	18	13
Argument and submission	20	14
Judgment	20	14
Order denying petition for rehearing	20	14
Opinion	21	14
Order allowing appeal, &c	26	17
Order amending findings of fact	27	17
Citation and proof of service of same	28	17
Assignment of errors	29	18
Bond	30	19
Clerk's certificate	32	20

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MAY 3, 1894.

a In the Supreme Court of Utah Territory.

JOHN O. SMITH
vs.
A. F. SIPPERLEY *et al.*, Defendants, and M. J. GRAY *et al.*, Intervenors and Appellants.

Transcript.

Endorsed: No. 376. Filed in the supreme court Apr. 27, 1893, at Salt Lake City, Utah. Jos. P. Bache, clerk.

1 In the District Court of the Third Judicial District of the Territory of Utah.

JOHN O. SMITH, GEORGE WHITING, CHARLES P. CONNOR, and GEORGE S. Smith, Composing the Firm of Smith, Whiting, Connor & Co., Plaintiffs,
vs,
A. F. SIPPERLY and H. S. LEE, Copartners under the Firm Name and Style of A. F. Sipperly & Co., Defendants.

The complaint of the plaintiff- herein respectfully shows:

That the plaintiffs above-named are copartners engaged in business under the firm name and style of Smith, Whiting, Connor & Co., and were such copartners at all the times hereinafter mentioned.

That the said defendants now are, and were at all the times hereinafter mentioned, copartners engaged in business under the firm name and style of A. F. Sipperly & Co.

2 That during the year 1891 the plaintiff- sold and delivered to said defendants as such copartners, at their special instance and request, goods, wares, and merchandise at and for the agreed price and value of $15,000, upon a credit which has not yet expired; that no part of said sum has been paid.

And, for a second and separate cause of action, plaintiffs allege that at the times hereinafter mention- Paul F. Folsom, James D. Rominus, and Paul F. Folsom, Jr., were copartners together in business under the firm name and style of Hawley, Folsom & Rominus.

That as such copartners, during the year of 1891, they sold and delivered to said defendants as such copartners goods, wares, and merchandise at and for the agreed price and value of $3,000, upon a credit which has not yet expired.

That heretofore, prior to the commencement of this action, for value received, the said Hawley, Folsom & Rominus duly assigned their said claim to said plaintiffs, who are now the owners and holders thereof, and that the same has not been paid nor any part thereof.

Plaintiffs further allege that they have applied for a writ of attachment herein against the property of said defendants, and that this action is brought pursuant to the provision of subdivision 5 of

section 3308 of the Compiled Laws of the Territory of Utah, and amendments thereto, on the ground that said defendants have assigned and disposed of their property with intent to defraud their creditors.

Wherefore plaintiffs demand judgment against said defendants for the sum of eighteen thousand ($18,000) dollars and the cost of this action.

DEY & STREET,
Plaintiffs' Attorneys.

Endorsed: Title court and cause. Filed Jan'y 15, 1892. Henry G. McMillan, clerk.

3 In the District Court of the Third Judicial District of Utah Territory. Salt Lake County.

JOHN O. SMITH, GEORGE WHITING, CHARLES P. CONNOR, and George S. Smith, Composing the Firm of Smith, Whiting, Connor & Company, Plaintiffs,

v.

A. F. SIPPERLEY & H. S. LEE, Partners under the Firm Name and Style of A. F. Sipperley & Co., Defendants, and M. J. Gray, Mistress A. F. Sipperley, Mistress E. J. Walling, H. A. Lee, and The Union Bank of Greeley, Colorado, Intervenors.

Intervening Complaint.

Come now M. J. Gray, Mistress A. F. Sipperley, Mistress E. J. Walling, H. A. Lee and the Union Bank of Greeley, Colorado, and by leave of the court in this behalf first obtained, file this their amended complaint of intervenor in the above-entitled cause, and for cause of complaint allege:

1st. That the said defendants, A. F. Sipperley & Co., are indebted to the plaintiff, M. J. Gray, by note dated January 12th, 1892, and due on demand, for the sum of $782.57, money loaned to said firm of A. F. Sipperly & Co.

2d. That the said defendants, A. F. Sipperley & Co., are indebted to the plaintiff, The Union Bank of Greeley, Colorado, in the sum of $1,500, due by three promissory notes for $500 each, dated August 15th, 1891, and due at four, five and eight months respectively, made by said A. F. Sipperley & Co. and bearing interest from date at 12 per cent. per annum.

3d. That on or about the 10th day of March, 1887, the said A. F. Sipperley being about to embark in the clothing business at Greeley, State of Colorado, borrowed from the plaintiff, Mistress A. F. Sipperley, the sum of $4,800, and on the 10th day of March, 1887, executed to said plaintiff his note for said amount due at two years from date, bearing 6 per cent. interest; that said money, to wit, $4,800, was used by the said Sipperley and invested in said business in Greeley, Colorado, and that no part of it has since been paid, but that the same, with interest thereon, is now due; that at the time of

the formation of the partnership of A. F. Sipperley with the defendant Lee, the said Lee knew that said money borrowed by the said Sipperley from this intervening plaintiff had been embarked in said business, and that no part of it had been paid, and he recognized the fact that said money was so due to this intervening plaintiff, and agreed that it should become a debt of said firm of A. F. Sipperley & Co., and that the said firm would pay the same.

4 4th. That on or about February, 1887, the said A. F. Sipperly borrowed from the intervening plaintiff, Mistress E. J. Walling, the sum of $1,400, and executed to her his note therefor; that said sum of money was by the said Sipperly invested in his business aforesaid, in Greeley, Colorado, and that when the defendant, Lee, became a member of said firm he had knowledge of the fact that said money was invested in the business and agreed and consented that the same should be and become a debt due from said partnership, and that the partnership would become liable for and pay the same.

5th. The plaintiff, H. A. Lee, alleges that he loaned to the defendant, H. S. Lee, the sum of $2,000.00, and that when the present partnership of A. F. Sipperly & Co. was formed, the said Lee put said money into the said business of A. F. Sipperly & Co., and it was understood and agreed by the partners composing said firm, that the same should be a firm debt, and that the said firm should be liable to this intervening plaintiff for the same, and that the said firm would pay the same.

6th. These intervening plaintiffs all allege, that on the 13th day of January, 1892, the said firm of A. F. Sipperly & Co., made and executed an assignment, or deed of trust, to one Frank W. Ross, as trustee, in which the debts of these intervening plaintiffs were included, and made preferred debts, and which were directed to be paid as such preferred debts; that in said conveyance was transferred to the said Ross, as trustee, the assets of said firm of Sipperly & Co., and the said Ross, as trustee, was directed to sell said property and to pay the debts of these intervening plaintiffs as preferred debts out of the proceeds of such sale.

7th. Plaintiffs further allege, that on the 15th day of January, 1892, the plaintiffs in this action filed their complaint in this court, upon which they procured an attachment which was levied upon the property conveyed in said assignment to the said Ross as trustee, and the said plaintiffs in this action are claiming that the

5 same shall be sold under said attachment and the proceeds applied to the payment of their debt, disregarding the rights of these plaintiffs.

Wherefore, plaintiffs pray, first, that a receiver be appointed to take charge of said property so attached in this cause, being the same mentioned and described in the deed of trust referred to in this intervening complaint, and that he hold the same under and subject to the orders of this court, pending litigation herein; and second, that upon the hearing hereof, said assignment above mentioned be declared valid and that the debts of these intervening plaintiffs be ordered to be paid out of the proceeds of the sale of the

property hereinabove mentioned, and finally grant to plaintiffs all such further, other and general relief as they may be entitled to.

J. W. JUDD,
Attorney for said Intervenor-.

TERRITORY OF UTAH, }
Salt Lake County, } *ss:*

——— ———, being duly sworn, on oath deposes and says that -he is one of the plaintiffs in the above-entitled complaint of intervention; that -he has heard read the foregoing complaint and knows the contents thereof, and that the same is true of *his* own knowledge except as to the matter- and things therein stated on information and belief, and that as to those -he believes it to be true.

MRS. A. F. SIPPERLEY.

Subscribed and sworn to before me this 1 day of Ap'l, 1892.

H. M. BACON,
Notary Public.

My commission expires ———.

6 In the District Court of the Third Judicial District of Utah Territory, Salt Lake County.

JOHN O. SMITH, GEORGE WHITING, CHARLES P. CONNOR, and Geo. S. Smith, Composing the Firm of Smith, Whiting, Connor & Co., Plaintiffs,

vs.

A. F. SIPPERLEY & H. S. LEE, Partners under the Firm Name and Style of A. F. Sipperley & Co., Defendants, and M. J. Gray, Mistress A. F. Sipperley, Mistress E. J. Walling, H. A. Lee and The Union Bank of Greeley, Colorado, Intervenors.

Answer to Complaint of Intervention.

Now come the plaintiffs above named, and for answer to the amended intervening complaint of the intervenors herein, admit, deny and allege as follows:

1. Plaintiffs admit that the defendants, A. F. Sipperly & Co., are indebted to M. J. Gray and to the Union Bank of Greeley, Colorado, as in said intervening complaint alleged.

2. Deny, upon information and belief, that on or about the 10th day of March, 1887, or at any other time, said A. F. Sipperly borrowed from Mrs. A. F. Sipperly the sum of $4,800.00, or any other sum, or that on the 10th day of March, 1887, or at any other time, he executed to her his note for said amount or any other amount as in said intervening complaint alleged or otherwise; also deny, upon like information and belief, that at the time of the formation of the partnership of A. F. Sipperly and H. S. Lee, said Lee recognized the fact that said money was due said Mrs. Sipperly from A. F. Sipperly, or agreed then or at any other time that it should become a

debt of said firm of A. F. Sipperly & Co., or that said firm should pay the same.

3. Also deny, on information and belief, that the said Sipperly borrowed from said Mrs. E. J. Welling the sum of $1,400.00, or any other sum, or executed to her his note therefor, or that said money was invested by said Sipperly in the business aforesaid, or that said Lee had knowledge of the fact that said money was invested in the business, or that said Lee agreed or consented that said money should be and become a debt due from said partnership, or that said partnership would become liable for and pay the same.

4. Deny, upon information and belief, that said H. A. Lee loaned the said H. S. Lee the sum of $2,000.00, or any other sum, or that said Lee put said money in said business of A. F. Sipperly & Co., or that it was understood and agreed by the partners composing
7 said firm, or any other persons, that the same should be a firm debt or any debt, or that said firm should be liable to said H. A. Lee for the same, or that the said firm should pay the same, or any other pretended claim whatsoever.

5. Plaintiffs admit that on the 13th day of January, 1892, the said firm of A. F. Sipperly & Co. made and executed an assignment to one Frank W. Ross, as trustee, in which the pretended debts of the said intervening claimants were included and made preferred debts, and allege that a copy of said assignment so made, executed, and recorded is hereto attached and made a part hereof, and that no other or different assignment was then or ever made.

6. Plaintiffs further allege that said assignment included only the partnership assets of said firm of A. F. Sipperly & Co., and was made by said Sipperly and said Lee as copartners as aforesaid for the purpose and with the intention of hindering, delaying, and defrauding these plaintiffs and all other unpreferred creditors of said firm, and that said pretended assignment was and is absolutely void as against the plaintiffs herein and all other creditors of said firm who have repudiated the same in that said firm being insolvent in and by said pretended assignment attempted to appropriate firm assets to pay the individual debts of the respective partners described in Schedule "B" of said partnership, and that said debts were not and never were debts of said partnership.

Wherefore plaintiffs pray that the complaint of the intervenors herein may be dismissed, and that said pretended assignment may be adjudged to be fraudulent and void as to the plaintiffs herein, with costs.

DEY & STREET,
Plaintiffs' Attorneys.

TERRITORY OF UTAH,)
County of Salt Lake,) ss:

Chas. C. Dey, being duly sworn, says that he is one of the attorneys for the above-named plaintiffs, and that he makes this verification on their behalf for the reason that his said clients are absent from the county wherein affiant resides; that he has read the foregoing answer and knows the contents thereof, and that the same

is true of his own knowledge except as to the matters therein stated on information and belief, and that as to those he believes it to be true.

CHAS. C. DEY.

[SEAL.] A. KOENEN, *N. P.*

8 In the District Court of the Third Judicial District of Utah Territory, Salt Lake County.

JOHN O. SMITH *et al.*, Plaintiffs,
vs.
A. F. SIPPERLEY *et al.*, Defendants, and M. J. GRAY, Mrs. A. F. Sipperley, Mrs. E. J. Walling, H. A. Lee, and The Union Bank of Greeley, Colorado, Intervenors.

Findings of Fact and Conclusions of Law.

This case having come on for trial before said court, without a jury, a jury having been duly waived by the parties hereto, and by the parties to the various actions hereinafter mentioned, in open court, and the trial of the issues joined herein on the complaint of intervention, and the answer thereto; and the following actions, namely, No. 10160, wherein Jacob Hirsh *et al.* are plaintiffs and said A. F. Sipperly *et al.* are defendants, and No. 10162, wherein Helen Sykes *et al.* are plaintiffs and A. F. Sipperly *et al.* are defendants, and No. 10163, wherein James A. McDougal *et al.* are plaintiffs and A. F. Sipperly *et al.* are defendants, having been heretofore, by order of the court, duly consolidated with the above-entitled action on a stipulation made and filed herein that all of said actions be heard and tried together as one action, on the issues joined between the plaintiffs and intervenors in this action; and the issue in each and all of said causes being identical, and to test the validity of the assignment by the defendants herein, A. F. Sipperly and H. S. Lee, composing the firm of A. F. Sipperly & Co., to F. W. Ross, assignee, of their partnership property, and this court, after hearing the proofs and evidence adduced, and counsel for the respective parties, and after full deliberation, makes and files the following findings of fact and conclusions of law:

Findings of Fact (1).

That on the 13th day of January, 1892, the said defendants, A. F. Sipperly and H. S. Lee, executed and delivered to one Frank W. Ross, as trustee, and not otherwise, an assignment, in writing, in words and figures following, to wit:

Whereas the firm of A. F. Sipperly & Co., composed of A. F. Sipperly and H. S. Lee, doing business in the city of Salt Lake, Utah Territory, under the above name and style, is indebted to the following persons in the several amounts as follows, that is to say—

9 1st. To M. J. Gray, of Salt Lake City, by note dated the 12th day of January, 1892, and due on demand, for seven hundred and eighty-two and $\frac{57}{100}$ ($782.57) dollars.

2d. To the Union Bank of Greeley, State of Colorado, by three notes for five hundred ($500) dollars each, aggregating in all fifteen hundred ($1,500) dollars; to U. A. Morlan, rent, $209.

These debts shall hereafter be known and designated in this conveyance as "Schedule A."

And, whereas, the said A. F. Sipperly is indebted to Mistress A. F. Sipperly, by note dated the 10th day of March, 1887, for four thousand eight hundred ($4,800) dollars, and to Mistress E. J. Walling, of South Cambridge, New York, by note of fourteen hundred ($1,400) dollars.

And, whereas, the above said H. S. Lee is indebted to H. A. Lee, by note, in the sum of two thousand ($2,000) dollars.

These last-named three debts shall hereafter be known in this conveyance as "Schedule B."

And, whereas, the firm of A. F. Sipperly & Co. is indebted to the following-named persons in the respective amounts named, that is to say—

To the firm of Smith, Whiting, Connor & Co., of Boston, Mass., by account	$12,106 50
To the firm of Hawley, Folson & Co., of Boston, Mass.	2,906 32
To the firm of Boyce & Milwayne, of Albany, N. Y.	485 00
To Causs, Shelton Hat Co., of St. Louis, Mo.	1,081 00
To the firm of J. A. McDougal & Co., Gloverville, N. Y.	448 25
To the firm of Crouse & Brandegee, of Utica, N. Y.	500 00
To the firm of Harsh Bros. & Co., Philadelphia, Pa.	368 70
To the firm of Hirsh, Elson & Co., Chicago, Ill.	677 00
To Rufus Waterhouse, New York city	88 00
To Steiner & Son, New York city	98 25
To Wilson Bros., Chicago, Ill.	178 50
To the Massachusetts Shirt Co., of Leominster, Mass	85 00
To C. D. Osborne & Co., of Chicago, Ill.	67 67
To the Goodyear Rubber Co., of New York city	340 00
To Steinheart, Heidelburg & Co., of New York city	291 00
To W. & F. Steinheart, of San Francisco, Cal.	971 00
To S. Sykes & Co., of New York city, by four promissory notes, executed in the month of December, 1891	1,391 00
To Weil, Haskell & Co., of New York city	27 00
To Herald Publishing Co., Salt Lake City, Utah	40 00

Which debts last above described shall hereafter be known and designated in this conveyance as "Schedule C."

Now, therefore, for the purpose of securing the payment of said debts in the order as shall be hereafter directed, we, the said Sipperly & Lee, do hereby sell and transfer to Frank W. Ross, of Salt Lake City, as trustee and not otherwise, the following personal property, namely:

All and entire our stock of goods of all kinds, character and description, consisting of men's and boys' clothing, hats, caps and gents' furnishing goods, and store fixtures, all now located, situated and being in that certain building, No. 15 and 17 West Second

South street, known as the Morian block, in Salt Lake City, Salt Lake county, Utah Territory. Also all and singular the book of accounts, debts, demands and choses in actions of all kinds and nature whatsoever, now owing and due to the said firm of A. F. Sipperly & Co. aforesaid, to the said Ross, as trustee aforesaid, for the following uses and purposes, and none other, that is to say, he will take immediate possession of said property herein mentioned and conveyed, and proceed to sell the same in such manner and upon such terms as he may deem best for the interest of the creditors and so as to derive therefrom the most money, but no goods shall be sold upon credit. The proceeds of said sale will be applied by said trustee as follows, and not otherwise:

11 I.

He will pay the costs incident to the execution of the trust herein created, including an attorney's fee to J. W. Judd for professional services in this behalf performed, and then pay the debts scheduled in this conveyance in the following order: First. He will prefer and pay the debts mentioned in "Schedule A" in full, principal and interest. Second. He will prefer and pay the debts mentioned and set forth in "Schedule B" in full, principal and interest. Third. He will then pay the debts mentioned in "Schedule C" in full, principal and interest, if there be enough money derived from the sale of this property herein conveyed to pay the same after paying the debts as hereinabove directed, and if not, he will pay the same *pro rata*, according to the respective amounts thereof. If, after discharging all the trusts created and contained in the foregoing deed there shall remain a surplus in the hands of the trustee, he will pay the same to us.

Witness our hands this 13th day of January, 1892.

A. F. SIPPERLY.
H. S. LEE.

TERRITORY OF UTAH, }
Salt Lake County, } ss:

On this 13th day of January, 1892, personally appeared before me, James H. Bacon, a notary public, the aforenamed A. F. Sipperly and H. S. Lee, the signers of the above and foregoing instrument, who duly acknowledged to me that they executed the same for the uses and purposes therein contained.

[SEAL.] JAMES H. BACON,
Notary Public.

I accept the trust of the foregoing instrument this 13th day of January, 1892.

FRANK W. ROSS.

12 II.

That after the execution and delivery of said assignment, said Ross took possession of the property mentioned in said assignment and was proceeding in the execution of the trust, when the attachments of plaintiffs *et als.* were levied and when their suits were filed. And said assignment was recorded in the office of the recorder of Salt Lake county, Utah, on January 14th, 1892.

III.

That at the time of making said assignment, and since on or about the month of August, 1891, the said A. F. Sipperly and H. S. Lee were copartners together in business under the firm name and style of A. F. Sipperly & Co., and that the property assigned was all and singular partnership property, and comprised all the assets of said firm.

IV.

That at the time of making said assignment said firm was, and had been ever since and at the time of its formation insolvent, and that each of the members thereof *were* at all the times aforesaid insolvent, and that said Sipperly and said Lee each knew of the insolvent condition of said firm and themselves at all the times as aforesaid.

V.

That on or about the month of March, 1887, said A. F. Sipperly, being about to embark in the mercantile business at Greeley, Colorado, borrowed from his wife, the said intervenor, the sum of $4,800.00, which, with interest at six per cent. per annum, is still due and unpaid, to be used by him as his capital in said business, with the knowledge and consent of his said wife, and that about the same time the said A. F. Sipperly borrowed from his aunt,
13 the said intervenor, Mrs. E. J. Welling, the sum of $1,400, which, with interest at — per cent. per annum, is still due and upaid, to be used by him as capital in said business, with the consent of said intervenor. That after borrowing the said capital, the said A. F. Sipperly embarked in business at Greeley, Colorado, and formed a copartnership at that time which his brother, H. D. Sipperly, "under the firm name and style of A. F. Sipperly & Co.;" to which said firm the said A. F. Sipperly contributed the sums he borrowed from his wife and aunt as his capital in said business, and his sole capital therein.

VI.

The said last-mentioned copartnership and business as aforesaid continued for about one and one-half years, when said copartnership was dissolved, and the said H. D. Sipperley retired; that said business was continued to be carried on and conducted by the said A. F. Sipperly under the said firm name of "A. F. Sipperly & Co." at Greeley, Colorado, as aforesaid, until on or about the month of

August, 1891, when said copartnership was formed with said H. S. Lee.

VII.

That the said defendant, H. S. Lee, entered the employ of the said defendant A. F. Sipperly, as a clerk in said business at Greeley, Colorado, during the month of May, 1890, and remained employed in said business until the time of the formation of the partnership between said defendants as hereinbefore found.

VIII.

That on or about the second day of September, 1890, the said Lee borrowed from his son H. A. Lee, one of the intervenors herein, the sum of $2,000.00, which, with interest, is still due and unpaid, in contemplation of going into partnership in said business
14 with A. F. Sipperly, to be used as his capital when said partnership should be formed, with the knowledge and consent of his son H. A. Lee.

IX.

That said H. S. Lee, after receiving said money from his son and before the formation of the partnership between said H. S. Lee and A. F. Sipperly, at different times loaned a portion of said money to said Sipperly, and thereafter, on or about the month of August, 1891, when the partnership aforesaid was formed, the balance of said $2,000 was contributed to the firm, making the sole capital of said Lee in said business the said sum of $2,000, borrowed from his son as aforesaid.

X.

That after the formation of said copartnership between said A. F. Sipperly and H. S. Lee at Greeley, Colorado, said business was continued under the said firm name of A. F. Sipperly & Co., and removed to Salt Lake City, Utah; that in contemplation of moving to Salt Lake City said firm ordered a large quantity of goods to be shipped to said last-named place, and thereafter opened business at Salt Lake City, made large purchases of goods and continued said business until the making of the assignment hereinabove set forth.

XI.

That the debts preferred in Schedule "B" of the said assignment were at the time of making said assignment and are the said individual debts of A. F. Sipperly to Mrs. A. F. Sipperly for $4,800, and to Mrs. E. J. Welling for $1,400, borrowed by the said A. F. Sipperly for his capital in said business as hereinabove found, and that of the $2,000 described in said Schedule "B" was at the time of making said assignment and is the individual debt of H. S. Lee to H. A. Lee, borrowed for his capital in said business as hereinbefore found, and that said sums so borrowed by said Sipperly and said
15 Lee, respectively, constituted their only capital in said business, and had been since the same were used in said business

to the time of the said assignment by said firm considered, reported, and held out to merchandise creditors and mercantile agencies as capital in the said business, and were not reported or made known in any manner as debts of said firm or otherwise.

XII.

That said assignment of partnership assets provided for the payment of the said individual debts of A. F. Sipperly and the said individual debt of the said H. S. Lee out of said partnership assets, before and in preference to the payment of the debts due the general merchandise creditors of said firm, set forth in Schedule "C" of said assignment, including the plaintiffs herein and the plaintiffs in each of said actions consolidated herewith.

XIII.

That said assignment was made by said defendants A. F. Sipperly and H. S. Lee to said Frank W. Ross with intent to hinder, delay, and defraud their creditors.

XIV.

That the plaintiffs herein, and the plaintiffs in said actions No. 10160, No. 10162 and No. 10163, after the making of said assignment, instituted their said respective actions in said court against the defendants herein as partners as aforesaid, and caused writs of attachments to be duly issued in each of said actions against the property of said A. F. Sipperly and H. S. Lee as copartners under the firm name of A. F. Sipperly & Co., and caused the same to be levied upon the partnership assets of said firm included in said assignment; that thereafter a receiver was appointed herein, by the order of this court, on the 21st day of January, 1892; that said receiver converted the assets of the firm so attempted to be
16 assigned, and attached as aforesaid, into money, out of which said receiver realized the sum of eleven thousand ($11,000) dollars. That thereafter, and on the 2d day of September, 1892, the said Jacob Hirsh *et al.*, as plaintiffs in said action No. 10160, duly recovered a judgment in said action in said court against said defendants, as partners as aforesaid, for the sum of $699 75 damages, and the sum of $41.50 costs; that on the same day the said Helen Sykes *et al.*, recovered a judgment in said action No. 10162, against said defendants as partners aforesaid, for the sum of $1,448.08 damages, and $41.90 costs; that on the same day the plaintiffs in the above-entitled action, John O. Smith *et al.*, duly recovered a judgment against said defendants as partners aforesaid, for the sum of $17,481.89 damages, and $47.00 costs; that on the 7th day of September, 1892, said James A. McDougall *et al.*, plaintiffs in said action No. 10163, duly recovered a judgment in their said action in said court against said defendants, as partners aforesaid, for the sum of $478.60 damages, and $42.00 costs.

XV.

That out of the money in the hands of the receiver herein the said Jacob Hirsch *et al.* are entitled to the amount of their said judgment, with interest and costs, first; and the said Helen Sykes *et al.* are entitled to the amount of their said judgment, with interest and costs, second; and the said James A. McDougall *et al.* are entitled to the amount of their said judgment, with interest and costs, third; and the said John O. Smith *et al.*, plaintiffs herein, are entitled to so much as remains in the hands of the receiver after paying the amount of the aforesaid judgments not exceeding the amount of their judgment herein.

17 *Conclusions of Law.*

I.

That said assignment so made, executed and delivered by the defendants A. F. Sipperly and H. S. Lee to said Ross, was, and is fraudulent and void as to creditors, and as to these plaintiffs herein, and as to the said Jacob Hirsh *et al.*, and as to the said Helen Sykes *et al.*, and as to the said James A. McDougall *et al.*, as attaching creditors of the firm of A. F. Sipperly & Co.

II.

That the said plaintiffs herein and the said Jacob Hirsh *et al.*, and the said Helen Sykes *et al.*, and the said James A. McDougall *et al.*, the respective plaintiffs in the said actions consolidated with the above-entitled action, are entitled to a judgment herein in their favor, and against the said intervenors herein, adjudging and decreeing said assignment fraudulent and void as to them and each of them as creditors of the said firm of A. F. Sipperly & Co., and dismissing said complaint in intervention herein, and in each of said actions, and directing that the said F. W. Ross, the receiver appointed herein, out of the proceeds and avails of said property attached herein, and in said other actions consolidated with this, pay upon demand to the said Jacob Hirsh *et al.*, plaintiffs in said action No. 10160, the amount of their judgment, to wit: the sum of $699.75, with interest from the 2d of September, 1892, at 8 per cent. per annum, together with the sum of $41.50 cost, first; and to pay to the said Helen Sykes *et al.*, plaintiffs in said action No. 10162, the amount of their judgment, to wit: the sum of $1,448.08, with interest thereon from the 2d day of September, 1892, at 8 per cent. per annum, together with $41.90 costs of suit, second; and to pay to the said James A. McDougall *et al.*, plaintiffs in said action
No. 10163, the amount of their judgment, to wit: the sum
18 of $478.60, with interest at the rate of 8 per cent. per annum, from the 7th day of September, 1892, together with the sum of $42 costs, third; and lastly, pay to the plaintiffs herein, whatever sum remains in his hands as such receiver, not exceeding the sum of $17,481.89, with interest from September 2d, 1892, at the rate of 8 per cent. per annum, together with $47.00 costs.

Let judgment be entered accordingly by the clerk of this court. Dated December 10th, 1892.

By the court:

C. S. ZANE, *Judge.*

In the District Court of the Third Judicial District of Utah Territory, Salt Lake County.

JOHN O. SMITH *et al.*, Plaintiffs,
v.
A. F. SIPPERLEY *et al.*, Defendants, and M. J. GRAY, Mrs. A. F. Sipperley, Mrs. E. J. Walling, H. A. Lee, and The Union Bank of Greeley, Colorado, Intervenors.

Judgment.

This cause having been at issue upon the complaint of the intervenors herein, and the answer *to* the plaintiffs herein thereto, and the same having been brought on for hearing and heard upon the issues joined herein, and a jury having been duly waived by the parties thereto in open court; and the following causes, viz., Nos. 10160, 10162 and 10163, having been theretofore, by order of said court, duly consolidated with the above entitled action, on a stipulation made and filed herein, that all of said action- be heard and tried together as one action on the issues joined between the plaintiffs and intervenors in this action, which were made the issue between the respective plaintiffs and said intervenors in each of said other actions; and after full deliberation on the evidence adduced, the court having made and filed its findings of fact and conclusions of law herein:

Now, therefore, on motion of Dey & Street and C. S. Kinney, attorneys for the plaintiffs herein, it is ordered, adjudged and decreed:

That the assignment made, executed and delivered by the defendants, A. F. Sipperly and H. S. Lee, to Frank W. Ross, as trustee, was and is fraudulent and void as to creditors and as to the plain-
19 tiffs herein and the plaintiffs in each of the actions consolidated with this action, as creditors of the firm of A. F. Sipperly & Co.

It is further ordered, adjudged and decreed that the said complaint of intervention be, and the same is hereby, dismissed.

It is further ordered and adjudged that F. W. Ross, the receiver appointed herein, out of the proceeds and avails of the property attached herein, and in said other actions consolidated with this action, pay, upon demand, to the said Jacob Hirsh *et al.*, plaintiffs in said action No. 10160, the amount of their judgment, to wit, the sum of $699.75, with interest from the 2d day of September, 1892, at 8 per cent. per annum, together with the sum of $41.50 costs, first. And to pay to the said Helen Sykes *et al.*, plaintiffs in said action No. 10162, the amount of their judgment, to wit, the sum of $1,448.08, with interest from September 2, 1892, at 8 per cent. per annum, together with $41.90 costs, second. And pay to the said

J. A. McDougal *et al.*, plaintiffs in said action No. 10163, the amount of their judgment, to wit, the sum of $478.60, with interest from September 7, 1892, at the rate of 8 per cent. per annum, together with the sum of $42 costs, third. And lastly, pay to the plaintiffs herein whatever sum remains in his hands as such receiver, not exceeding the sum of $17,481.89, with interest from September 2, 1892, at the rate of 8 per cent. per annum, together with $47 costs.

Dated this 10th day of December, 1892.

C. S. ZANE, *Judge.*

20 In the Supreme Court of Utah Territory, Regular June Term, 1893.

WEDNESDAY, *June 21st.*

JOHN O. SMITH *et al.*
vs.
A. F. SIPPERLEY *et al.*, Def'ts, and M. J. GRAY *et al.*, Intervenors & Appellants.

This cause, coming on regularly to be heard, was argued by Hon. John W. Judd in behalf of appellants, by Chas. C. Dey, Esq., in reply, was submitted, and taken under advisement.

(Title of Cause.)

Regular June Term, 1893.

WEDNESDAY, *August 30th.*

This cause having been heretofore argued and submitted and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment of the district court therein be, and the same is hereby, affirmed, with costs.

Title Court and Cause.

Regular June Term, 1893.

SATURDAY, *October 28th*, 1893.

The petition for a rehearing of this cause heretofore filed is denied.

21 In the Supreme Court of Utah.

JOHN O. SMITH *et al.*, Respondents,
vs.
A. F. SIPPERLEY *et al.*, Appellants.

SMITH, *J.:*

A. F. Sipperley and H. S. Lee were, prior to January 13th, 1892, partners, doing business as merchants at Salt Lake City, and on the above date made an assignment, for the benefit of their creditors, of all of their property to F. W. Ross.

The written assignment, which appears in the record, after creating a class of first-preferred creditors, which is denominated "Schedule A," contains the following clause:

"And whereas the said A. F. Sipperley is indebted to Mrs. A. F. Sipperley by note dated the 10th day of March, 1887, for $4,800.00, and to Mrs. E. J. Walling, of South Cambridge, New York, by note of fourteen hundred dollars ($1,400.00);

"And whereas the above said H. S. Lee is indebted to H. A. Lee by note in the sum of two thousand dollars ($2,000.00); these last-named three debts shall hereafter be known in this conveyance as Schedule 'B.'"

Then follows a long list of creditors of the firm who are classed as Schedule "C."

The writing provides that the assignee shall pay the debts in the following order: First, Schedule "A" in full; next, Schedule "B" in full; next, Schedule "C" in full, and the surplus, if any, to
22 the assignors.

Schedule "A" amounts to about $3,000.00. Schedule "B," as above shown, amounted to $8,200.00, without interest. Schedule "C" amounted to about $22,000.00. Only $11,000.00 was realized from the property assigned.

A number of the creditors named in Schedule "C" renounced the assignment so far as their claims were concerned and attached the property of Sipperley & Co. in the hands of Ross, the assignee.

Ross defended, and the creditors in Schedules "A" and "B" intervened. Ross was afterwards by agreement appointed receiver by the court, and as such sold the property and holds the proceeds, to be disposed of by the judgment of the court.

The court found, among other things, the following facts:

That Mrs. A. F. Sipperley was the wife and Mrs. E. J. Walling was the aunt of the assignor A. F. Sipperley; that H. A. Lee was the son of the assignor H. S. Lee; that the firm of Sipperley & Co. and both members thereof were insolvent and had each and all been insolvent since the time they first began business, in 1887; that the money due to the parties named in Schedule "B" was the only capital employed by said firm in said business and was loaned by said creditors to the members of the firm to be used as such capital with full knowledge of the insolvency of the firm and the members thereof; that the attaching creditors did not know of the existence of these debts until the assignment was made.

The thirteenth finding of fact is—

"That said assignment was made by said defendants, A. F. Sipperley and H. S. Lee to said Frank W. Ross with intent to
23 hinder, delay, and defraud their creditors."

After making proper conclusions of law the court entered judgment, making distribution of the fund in the hands of the receiver among the attaching creditors in the order of their attachments, and dismissed the petition in intervention.

The intervenors appeal.

The first question presented is, Was the assignment void because of the preference of the creditors of the individual partners as provided in Schedule "B"?

The next and remaining one is, If the assignment is void as to the preference given to the parties named in Schedule "B," is it not valid for all other purposes?

As to the first question. It is conceded the firm was always insolvent, and that the members thereof were likewise insolvent. The creditors in Schedule "B" knew this and knowingly loaned the money to be used as capital in this business. Is it a fraud upon the other creditors to provide for and prefer these parties?

We think it is well settled that such an act is fraudulent and void.

In Webb *v.* Ormstead, 26 Fed., 70, which was a case very like the one under consideration, the court says:

"These creditors were dealing with him on the faith of such capital in ignorance of the fact that he was all the time insolvent and that large family debts of many thousand dollars were lying in abeyance, to be preferred whenever the business should come to the disastrous end which was inevitable. I do not know how a more gross injustice could be done those who gave credit on the
24 faith of a large in-put capital than was done by this deed, which revealed the fact, when it was too late, that there was no capital whatever available to protect them in the event of losses in trade or shrinkage in value." This language we have quoted at length because it so aptly describes the case at bar. To the same effect are the cases of Ferson *v.* Monroe, 21 N. H., 462; Bailey *v.* Clark, 13 Wall., 284; Morse *v.* Cribb, 77 Wis., 322.

This brings us to the second question, Can the assignment be upheld in any part?

The Supreme Court of the United States in Peters *v.* Bain, 133 U. S., at page 688, say: "We agree that as respects fraud in law as contradistinguished from fraud in fact, where that which is valid can be separated from that which is invalid without defeating the general intent, the maxim 'void in part, void *in toto*,' does not necessarily apply." And this rule is relied on by appellants to sustain the assignment, notwithstanding the fraudulent preferences in Schedule "B."

At the argument we were forcibly impressed with this suggestion, but the trouble is that in this case the assignment is fraudulent in fact; it was made with a fraudulent design and purpose. This fact is expressly found. The rule in such a case is declared in Crawford *vs.* Neal, 144 U. S., at page 598, as follows: "Undoubtedly the rule is that a transaction void in part for fraud in fact is entirely void."

The rule is fully stated with the authorities in support of it in Burrill on Assignments, sec. 352, 5th ed.
25 See also Vernon *vs.* Upson, 60 Wis., 418.

We find no error in the record, and the judgment of the district court is affirmed, with costs to respondents.

We concur.
MINER, *J.*
BARTCH, *J.*

Filed Aug. 30, 1893. JOS. P. BACHE, *Clerk.*

26 In the Supreme Court of Utah Territory, Regular June Term, 1893.

SATURDAY, *October* 28*th*.

JOHN O. SMITH *et al.*
vs.
A. F. SIPPERLEY, Def'ts, and M. J. GRAY *et al.*, Intervenors & Appellants.

In this cause counsel for appellants prays the allowance of an appeal from the judgment of this court, rendered therein, to the Supreme Court of the United States, and asks that the amount of a bond to be given thereon be now fixed, and it was ordered that such appeal, as prayed for, be and is hereby allowed, and the amount of a bond to be given thereon is fixed in the sum of five thousand dollars, and the amount of a bond for costs is fixed in the sum of five hundred (500) dollars.

27 In the Supreme Court of Utah Territory, Regular January Term, 1894.

TUESDAY, *January* 23*rd*.

JOHN O. SMITH *et al.*
vs.
A. F. SIPPERLEY *et al.*, Appellants.

It is ordered that the 13th finding of fact be amended by adding thereto the following words:

"By preferring the debts due to members of the families of the assignors and due from them individually and not as partners, which debts were the sole capital of the assignors in the partnership and which debts had been concealed from the knowledge of creditors of the firm, over debts due partnership creditors, and directing that they be paid out of the firm assets to the exclusion of creditors of the firm."

And that said finding, so amended, be certified to the Supreme Court of the United States as and for the 13th finding of fact.

28 By the Honorable Charles S. Zane, chief justice of Utah, to John O. Smith, George Whiting, Charles P. Connor, George S. Smith, and to Messrs. Dey & Street and C. S. Kinney, their attorneys, Greeting:

Whereas Mistress A. F. Sipperley, Mistress E. J. Walling, H. A. Lee, and The Union Bank of Greeley, Colorado, have lately appealed to the Supreme Court of the United States from a judgment and decree rendered in the supreme court of the Territory of Utah in favor of you, the said John O. Smith, George Whiting, Charles P. Connor, and George S. Smith, and against said Mistress A. F. Sipperley, Mistress E. J. Walling, H. A. Lee, and The Union Bank of ——, Colorado, and have filed the security required by law:

You are therefore hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of

Washington within sixty (60) days from the date hereof, to do and receive what may pertain to justice to be done in the premises.

Given under my hand at the City of Salt Lake, in the Territory of Utah, this 4th day of January, in the year of our Lord one thousand eight hundred and ninety-four.

[Seal Supreme Court, Territory of Utah, United States of America.]

C. S. ZANE,
Chief Justice of Utah.

Attest: JOSEPH P. BACHE,
Clerk Supreme Court of Utah.

Due service of the above citation admitted this 12th day of January, A. D. 1894.

DEY & STREET,
C. S. KINNEY,
Per S.

[Endorsed:] In the Supreme Court of Utah. John O. Smith *et al. v.* A. F. Sipperley *et al.* and M. J. Gray *et al.*, intervenors and appellants. Original citation. Filed in the supreme court Jan. 12, 1894, at Salt Lake City, Utah. Jos. P. Bache, clerk.

29 In the Supreme Court of the United States.

JOHN O. SMITH *et al.*
vs.
A. F. SIPPERLEY *et al.*, and Mrs. A. F. SIPPERLEY, Mrs. E. J. Walling, H. A. Lee, and The Union Bank of Greeley, Colorado, Intervenors & Appellants.

Comes now J. W. Judd, attorney for the intervenors and appellants, and assigns error upon the ruling and judgment of said supreme court of Utah in the above-entitled cause as follows:

I.

Said court erred in adjudging that the assignment mentioned in the complaint of the intervenors, being the one executed by A. F. Sipperley & Co. to F. W. Ross, as assignee, and set forth in the findings of fact, is fraudulent and void.

II.

Said court erred in affirming the judgment of the trial court, because the facts as found by said supreme court do not justify or support the judgment affirmed.

Wherefore appellants pray that an appeal may be allowed them from said judgment, and that said judgment may be reversed and the cause remanded.

J. W. JUDD,
Attorney for Intervenors & Appellants.

29½ [Endorsed:] In the supreme court of Utah. John O. Smith *et al. v.* A. F. Sipperley *et al.* and M. J. Gray *et al.*, appellants. Assignment of errors. Filed in the supreme court Jan. 12, 1894, at Salt Lake City, Utah. Jos. P. Bache, clerk.

30 In the Supreme Court of Utah Territory.

JOHN O. SMITH *et al.*, Respondents,
vs.
A. F. SIPPERLEY *et al.*, Defendants, and M. J. GRAY *et al.*, Intervenors, Appellants.

Know all men by these presents that we, Mistress A. F. Sipperley, Mistress E. J. Walling, H. A. Lee, and The Union Bank of Greeley, Colorado, as principals, and Fred. J. Leonard and J. L. Justice and Geo. Cullins, of Salt Lake City, Utah, are held and firmly bound unto the above-named John O. Smith, George Whiting, Charles P. Connor, and George S. Smith, composing the firm of Smith, Whiting, Connor & Company, in the full and just sum of five thousand five hundred ($5,500.00) dollars, to be paid to the said John O. Smith, George Whiting, Charles P. Connor, and George S. Smith, their executors, administrators, or assigns; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, or administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 22nd day of December, A. D. 1893.

Whereas the above-named Mistress A. F. Sipperley, Mistress E. J. Walling, H. A. Lee, and The Union Bank of Greeley, Colorado, have prosecuted an appeal to the Supreme Court of the United States to reverse the judgment and decree rendered in the above-entitled suit by the supreme court of the Territory of Utah on the 30th day of August, 1893:

Now, therefore, the condition of this obligation is such that if the above-named Mistress A. F. Sipperley, Mistress E. J. Walling, H. A. Lee, and The Union Bank of Greeley, Colorado, shall prosecute said appeal to effect and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

MRS. A. F. SIPPERLEY.
MRS. E. J. WALLING.
H. A. LEE.
UNION BANK OF GREELEY, COLO.,
By J. W. JUDD, *Their Att'y.*
FRED. J. LEONARD.
J. L. JUSTICE.
GEO. CULLINS.

In the presence of—
JOSEPH P. BACHE.

Approved:
C. S. ZANE,
Chief Justice of Utah.

31 TERRITORY OF UTAH, } ss:
County of Salt Lake, }

Came Fred. J. Leonard, Geo. Cullins, and J. L. Justice, who, being duly sworn, depose and say each for himself and not one for the other that he is a citizen and resident of said State and county, and that he is worth over and above all his debts and exemptions allowed by law the sum of five thousand five hundred dollars ($5,500.00), the penalty of said bond aforesaid.

FRED. J. LEONARD.
J. L. JUSTICE.
GEO. CULLINS.

Sworn to and subscribed before me this 22nd day of Dec., 1893.

JOSEPH P. BACHE,
[SEAL.] *Clerk Supreme Court of Utah Territory.*

Marked: Filed in the supreme court Dec. 22, 1893, at Salt Lake City, Utah. Jos. P. Bache, clerk.

32 UNITED STATES OF AMERICA.

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

I, Joseph P. Bache, clerk of the supreme court of Utah, in pursuance of an appeal allowed in the case of John O. Smith *et al. vs.* A. F. Sipperley *et al.*, defendants, and M. J. Gray *et al.*, intervenors and appellants, lately pending in said court, do return attached hereto a full, true, and complete copy of the complaint, intervening complaint, answer to complaint in intervention, findings of fact and conclusions of law, and decree, together with the record and proceedings, opinion, bond, assignment of errors, with the original citation, all in and of said court in said cause, to the Supreme Court of the United States; and I hereby certify that said attached transcript of said record is a full and complete copy of the several originals thereof on file or of record in my office.

Seal Supreme Court, Territory of Utah, United States of America.

In witness whereof I hereunto set my hand and affix the seal of the supreme court of Utah Territory this thirty-first day of January, A. D. 1894, at Salt Lake City, Utah.

JOSEPH P. BACHE,
Clerk Supreme Court of Utah.

Endorsed on cover: Case No. 15,570. Utah Territory supreme court. Term No., 1186. Mrs. A. F. Sipperley, Mrs. E. J. Walling, H. A. Lee, and The Union Bank of Greeley, Colorado, appellants, *vs.* John O. Smith, George Whiting, Charles F. Connor, and George S. Smith. Filed April 10, 1894.

Office Supreme Court, U. S.
FILED.
SEP 14 1894
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. ~~156~~. 688.

MRS. A. F. SIPPERLEY, MRS. E. J. WALLING, H. A. LEE, AND THE UNION BANK OF GREELEY, COLORADO, APPELLANTS,

vs.

JOHN O. SMITH, GEORGE WHITING, CHARLES F. CONNOR, AND GEORGE S. SMITH.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

MOTION TO DISMISS OR AFFIRM.

1. Now come John O. Smith, George Whiting, Charles F. Connor, and George S. Smith, the appellees, and move to dismiss the appeal in the above-entitled cause under rule six of the rules of this honorable Court, because of the non-joinder of Mr. A. F. Sipperley and H. S. Lee (who constitute the firm of A. F. Sipperley & Co., the original defendants) in the appeal from the judgment and decree and are not parties to the appellate proceedings, and for the further

reason that there is a misjoinder of Messrs. Dey and Street and C. S. Kinney, who were not parties to the cause in the court below, and who are not interested in the judgment.

2. And the said appellees further move that the judgment and decree of the court below be affirmed if it be not dismissed pursuant to the above motion, because it is obvious that the questions involved in said appeal are frivolous, and that the appeal was taken for delay only.

C. H. ARMES,
Attorney for Appellees.

To J. W. JUDD, Esq.,
Salt Lake City, Utah, Attorney for the Appellants:

Take notice that on Monday, the 15th day of October, 1894, or as soon thereafter as the Court will entertain the same, the above motion will be submitted to the Court.

C. H. ARMES,
Attorney for the Appellees.

THE CASE.

The record shows that the insolvent firm of A. F. Sipperley and Co. (composed of A. F. Sipperley and H. S. Lee), on the 13th of January, 1892, made an assignment of all their partnership property ostensibly for the benefit of their creditors, but in fact with intent to hinder, delay, and defraud them, giving preference to the personal debts of the individual members of the firm to an extent nearly equal to the whole of the proceeds of their assets.

The court below adjudged the assignment fraudulent and void in fact and ordered the receiver appointed in the proceedings to apply said proceeds to the payment of the debts of certain unpreferred creditors who had instituted attachment proceedings, including these appellees.

From said judgment certain of the preferred creditors,

and they only, have appealed to this Court. Neither of the assignors (Mr. Sipperley nor H. S. Lee) appealed, and the citation issued runs not only to these appellees, but also to their counsel in the court below.

A more detailed statement of the case shows that on the 15th day of January, 1892, the appellees, John O. Smith, George Whiting, Charles P. Connor, and George S. Smith, composing the firm of Smith, Connor, Whiting & Co., sued the above firm of Sipperley & Co. in the third judicial district of Utah Territory for the recovery of $18,000 for goods sold on a credit then subsisting and levied an attachment on the assigned property upon the ground that said Sipperley & Co. had disposed of their property with intent to defraud their creditors. (Record, p. 1.)

Thereupon M. J. Gray, Mistress A. F. Sipperley, Mistress E. J. Walling, H. A. Lee, and the Union Bank of Greeley, Colorado, filed an intervening complaint, alleging substantially that said defendants, A. F. Sipperley & Co., are indebted as follows: To said Gray in the sum of $782.57, for money loaned; to said Union Bank of Greeley in the sum of $1,500, with interest from August 15, 1891, for money loaned; to Mistress A. F. Sipperley in the sum of $4,800, with interest from the 10th of March, 1887, for money loaned to Mr. Sipperley; to Mrs. E. J. Walling in the sum of $1,400, with interest from February, 1887, for money loaned to Mr. Sipperley; to H. A. Lee in the sum of $2,000, money loaned to said H. S. Lee, and alleging that the members of said firm of Sipperley & Co. agreed that said loan should be and become debts due from said partnership and that said partnership would become liable for and pay the same (p. 3). Said intervening complaint also averred that said firm of A. F. Sipperley & Co., on the 13th day of January, 1892, made an assignment to one Frank W. Ross as trustee of the assets of said firm, in which the debts of said intervenors were included and made preferred debts, and that on the 15th day of January, 1892, the plaintiffs in this action

(these appellees) filed their suit and levied an attachment upon the property conveyed in said assignment, as above mentioned, and prayed for a receiver and that said assignment be declared valid and that their debts be ordered to be paid out of the proceeds of said property, and for general relief (p. 3).

Thereupon said original complainants (these appellees) filed an answer to said intervening complaint, admitting the alleged indebtedness of said A. F. Sipperley & Co. to said M. J. Gray and to the Union Bank of Greeley and denying the alleged loans to A. F. Sipperley by Mrs. Sipperley and Mrs. Walling, and denying the alleged loan by H. A. to H. S. Lee.

They admit the alleged assignment of said Sipperley & Co., and set forth a copy thereof as a part of their answer, and they aver that said assignment was made for the purpose and with the intention of hindering, delaying, and defrauding the plaintiff and all other unpreferred creditors of said firm, and that the same was and is absolutely void as against the plaintiff and all other creditors of said firm who have repudiated the same in that the said firm, being insolvent, in and by said assignment attempted to appropriate firm assets to pay individual debts of the respective parties, and that said debts never were debts of said partnership, and they pray that the complaint of said intervenors be dismissed, and that said pretended assignment be adjudged fraudulent and void as to them.

A trial was had by the court without a jury, a jury having been waived, and the trial judge filed a statement of facts found, among which are substantially the following (Record, p. 6):

1. That on the 13th day of January, 1892, the said defendants, A. F. Sipperley and H. S. Lee, executed and delivered to one Frank W. Ross, as trustee and not otherwise, an assignment in writing in words and figures following, to wit:

"Whereas the firm of A. F. Sipperley & Co., composed of A. F. Sipperley and H. S. Lee, doing business in the city of Salt Lake, Utah Territory, under the above name and style, is indebted to the following persons in the several amounts as follows—that is to say:

1st. To M. J. Gray, of Salt Lake City, by note dated the 12th day of January, 1892, and due on demand, for $782.57.

2d. To the Union Bank of Greeley, State of Colorado, by three notes of $500 each, aggregating in all $1,500; to U. A. Morlan, rent, $209.

These debts shall hereafter be known and designated in this conveyance as 'Schedule A.'

And whereas the said A. F. Sipperley is indebted to Mistress A. F. Sipperley by note dated the 10th day of March, 1887, for $4,800, and to Mistress E. J. Walling, of South Cambridge, New York, by note of $1,400;

And whereas the above said H. S. Lee is indebted to H. A. Lee by note in the sum of $2,000.

These last-named three debts shall hereafter be known in this schedule as 'Schedule B.'

And whereas the firm of A. F. Sipperley & Co. is indebted to the following-named persons in the respective amounts named—that is to say, to the firm of Smith, Connor, Whiting & Co., of Boston, Massachusetts, by account, $12,106.50.

To the firm of Hawley, Folsom & Co., of Boston, Massachusetts, $2,906.32.

(Here follows a list of unpreferred creditors, all of whose debts aggregate over $22,000.) (See Record, p. 7.)

Which debts last above described shall hereafter be known and designated in this schedule as 'Schedule C.'

Now, therefore, for the purpose of securing the payment of said debts in the order as shall be hereafter directed, we, the said Sipperley and Lee, do hereby sell and transfer to said Frank W. Ross, of Salt Lake City, as trustee and not otherwise, the following personal property, namely, all and entire our stock of goods of all kinds, character, and description, consisting of, etc., * * * for the following uses and purposes and none other—that is to say, he will take immediate possession of said property herein mentioned and conveyed and proceed to sell the same in such manner and upon such terms as he may deem best for the interest of the creditors and so as to derive therefrom the most money, but no goods shall be sold upon credit. The pro-

ceeds of said sale will be applied by said trustee as follows and not otherwise: He will pay the costs incident to the execution of the trust herein created * * * and then pay the debts scheduled in this conveyance in the following order: First, he will prefer and pay the debts mentioned in Schedule A in full, principal and interest; second, he will prefer and pay the debts mentioned and set forth in Schedule B in full, principal and interest; third, he will then pay the debts mentioned in Schedule C in full, principal and interest, if there be enough money derived from the sale of this property herein conveyed to pay the same after paying the debts as hereinabove directed, and if not he will pay the same *pro rata* according to the respective amounts thereof. If after discharging all the trusts created and contained in the foregoing deed there shall remain a surplus in the hands of the trustee, he will pay the same to us." (Record, pp. 6, 7, 8.)

2. * * * * *

3. That the property assigned comprised all the assets of said firm.

4. That the firm and each member thereof was insolvent at the time of making said assignment and had been from the time of the formation of the copartnership, and each member knew of such insolvency.

5. That said A. F. Sipperley borrowed said sum of $4,800 from his wife and said sum of $1,400 from his aunt, Mrs. Walling, in 1887, to engage in business in partnership with his brother at Greeley, Colorado, under the firm name of A. F. Sipperley & Co.

6, 7, 8, 9. That said copartnership and business continued at Greeley about one and a half years, when the brother withdrew from said firm and said A. F. Sipperley continued the business under the same firm name until August, 1891, when said H. S. Lee became a partner. Said Lee had been employed as a clerk in said firm since May, 1890. In September, 1890, said Lee borrowed from his son, H. A. Lee, one of the intervenors, $2,000, in contemplation of going

into said partnership, to be used as his capital; that said H. S. Lee at different times before entering said partnership loaned a portion of said $2,000 to said Sipperley and contributed the balance when the partnership was formed.

10. That after the formation of said copartnership between A. F. Sipperley and H. S. Lee at Greeley, Colorado, said business was conducted under the firm name of A. F. Sipperley & Co. and removed to Salt Lake City, Utah; that in contemplation of moving to Salt Lake City said firm ordered a large quantity of goods to be shipped to said last-named place and thereafter opened business at Salt Lake City, made large purchases of goods, and continued said business until the making of the assignment hereinabove set forth.

11. That the debts preferred in Schedule B were and are the individual debts of Mr. Sipperley and H. S. Lee respectively, as above stated, and that said sums constituted their only capital in said business, and up to the time of the said assignment by said firm had been considered, reported, and held out to merchandise creditors and mercantile agencies as capital in said business, and were not reported or made known in any manner as debts of said firm or otherwise.

13. That said assignment was made by said defendants A. F. Sipperley and H. S. Lee with intent to hinder, delay, and defraud their creditors.

14. That the plaintiffs herein and other creditors, after the making of said assignment, instituted their respective actions and caused writs of attachment to be duly issued against said copartnership property, and thereafter a receiver was appointed by the court and said receiver sold the assets of the firm so attached and realized the sum of $11,000; that thereafter judgments were obtained by certain of said creditors as follows:

On 2d September, 1892, Jacob Hirsh, for $699.75, besides costs.

Helen Sykes, for $1,448.08, besides costs.

John O. Smith and others (these appellees), for $17,481.89, besides costs.

And on the 7th day of September, 1892, one McDougal, another of said attaching creditors, recovered a judgment for $478.60, besides costs.

Whereupon, the several causes of said attaching creditors having been heard with this cause (p. 13), it was by the court ordered, adjudged, and decreed as follows:

"That the assignment made, executed, and delivered by the defendants A. F. Sipperley and H. S. Lee to Frank W. Ross, as trustee, was and is fraudulent and void as to creditors and as to the plaintiffs herein, and the plaintiffs in each of the actions consolidated with this action as creditors of the firm of A. F. Sipperley & Co.

It is further ordered, adjudged, and decreed that the said complaint of intervention be, and the same is hereby, dismissed.

It is further ordered, adjudged, and decreed that F. W. Ross, the receiver appointed herein, out of the proceeds and avails of the property attached herein and in said other actions consolidated with this action pay upon demand (the aforesaid Jacob Hirsh first and Helen Sykes second and McDougal third, with interest from the date of said judgments respectively, then lastly) to the plaintiffs herein whatever sum remains in his hands as such receiver, not exceeding the sum of $17,481.89, with interest from September 2, 1892, at the rate of 8 per cent. per annum, together with $47, costs." (Record, p. 13.)

Said judgment was on August 30, 1893, by the supreme court of Utah affirmed with costs.

(After deducting the sums ordered paid to the several other attaching creditors out of said $11,000 there remains in the hands of the receiver applicable to the appellees' judgment about $8,000.)

From said decree of said supreme court of Utah counsel for appellants prayed an appeal to this Court on October 28, 1893. (Record, p. 17.)

Thereafter the said Mistress A. F. Sipperley, Mistress E. J.

Walling, H. A. Lee, and the Union Bank of Greeley, Colorado, as principals, executed their supersedeas bond, with sureties, to these appellees, John O. Smith, George Whiting, Charles P. Connor, and George S. Smith, composing the firm of Smith, Whiting, Connor & Co., in a sum fixed by the court, reciting that the above-named Mistress A. F. Sipperley, Mistress E. J. Walling, H. A. Lee, and the Union Bank of Greeley, Colorado, had prosecuted said appeal and conditioned that they should prosecute the same to effect, etc. (p. 19).

And thereafter a citation was issued as follows:

"By the Honorable Charles S. Zane, chief justice of Utah, to John O. Smith, George Whiting, Charles P. Connor, George S. Smith, and to Messrs. Dey & Street and C. S. Kinney, their attorneys, Greeting:

"Whereas Mistress A. F. Sipperley, Mistress E. J. Walling, H. A. Lee, and the Union Bank of Greeley, Colorado, have lately appealed to the Supreme Court of the United States from a judgment and decree rendered in the supreme court of the Territory of Utah in favor of you, the said John O. Smith, George Whiting, Charles P. Connor, and George S. Smith, and against said Mistress A. F. Sipperley, Mistress E. J. Walling, H. A. Lee, and the Union Bank of Colorado, and have filed the security required by law:

"You are therefore hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington within sixty (60) days from the date hereof, to do and receive what may pertain to justice to be done in the premises.

"Given under my hand at the city of Salt Lake, in the Territory of Utah, this 4th day of January, in the year of our Lord one thousand eight hundred and ninety-four." (Record, pp. 17, 18.)

Argument.

There is a Non-joinder of Necessary Parties.

Neither A. F. Sipperley nor H. S. Lee, the members of the assigning firm, have appealed. The bond expressly recites that Mistress A. F. Sipperley, Mistress E. J. Walling, H. A. Lee, and the Union Bank of Greeley have prosecuted the appeal; and the citation recites the names of the same parties as the appellees, and it runs to "John O. Smith, George Whiting, Charles P. Connor, George S. Smith, and to Messrs. Dey and Street and C. S. Kinney, their attorneys" (Record, p. 17), *and not to or in the name of any other party connected with the suit;* and there has been no severance.

A. F. Sipperley and H. S. Lee, the members of the assigning firm, are the principal parties interested in the common point at issue, namely, the alleged fraudulent character of the transfer. They were parties and necessary parties to the suit below; the decree was against them as well as against the appellants, and is a joint decree against all of them. The assignors are to be bound by the judgment of this Court as well as of the court below, and are necessary parties here as well as there.

In Lawrence *vs.* Bank of Republic, 35 N. Y., 324, the court observed:

"In a creditor's suit against a judgment debtor to set aside a prior assignment made by him in trust for the benefit of creditors on the ground of fraud, he is a necessary party. Indeed, he must be deemed the principal party; otherwise different persons, claiming portions of the assignees' property, could not be joined as defendants. The common point of litigation is the alleged fraudulent transfer of the property."

In Gaylords *vs.* Kelshaw *et al.*, 1 Wall., 81, this Court held that, in a bill to set aside a conveyance as made without consideration and in fraud of creditors, the alleged fraudulent grantor is a necessary defendant in the bill. The Court said:

"If the conveyance to Butterworth (the grantee) shall be decreed to be set aside, and the property conveyed to him, subjected to the payment of plaintiff's debt, it is proper that Kelshaw (the grantor) should be bound by the decree; and to that end he ought to be a party."

In Hardee *vs.* Wilson, 146 U. S., 179, this Court held that where a decree in equity is a joint one against all the defendants all the parties defendant must join in the appeal from it. In that case it appears that Benjamin J. Wilson filed his bill of complaint against James M. and Annie E. Minor and John L. Hardee, charging that a certain conveyance of land made March 18, 1876, by said James M. Minor to himself, as trustee for his wife, Annie E., and a certain other conveyance of the same lands made February 6, 1877, to John L. Hardee was without consideration and with intent to defraud the complainant Wilson and other creditors, and prayed that said deeds might be declared null and void. The suit resulted in a final decree, declaring in effect that the trust deed in favor of Minor's wife was void and that the deed to Hardee could only operate as a security for the payment of a certain sum of money found to be due Hardee. Hardee appealed, and the appeal was dismissed because the decree was a joint one and Minor and his wife, the codefendants of Hardee, were not parties to the appeal.

In Davis *vs.* Mercantile Trust Co., 152 U. S., 593, this Court stated that it is one of the ordinary rules that "all the parties to the record who appear to have any interest in the order or ruling challenged must be given an opportunity to be heard on such appeal." (Referring to Masterson *vs.*

Herndon, 10 Wall., 416; Hardee *vs.* Wilson, 146 U. S., 179; also Inglehart *vs.* Stansbury, 151 U. S., 68.)

The principles involved in the above cases appear to apply to this case.

There is Also a Misjoinder of Parties.

By the citation these appellees and "Messrs. Dey and Street and C. S. Kinney, their attorneys," are cited and admonished to be and appear in this court, etc.

If it be argued that this writ, whereby the counsel in the court below for the appellees are joined with the parties in interest as appellees, was in fact intended merely as a notice to counsel that the appeal had been taken, still in legal effect it appears to come within the ruling of this Court in the case of Davenport *vs.* Fletcher, 16 How., 142. There, among other reasons for dismissal, it was held that *where the citation is issued to a person who is not a party the writ of error will be dismissed on motion.* In that case the interests of the appellees in the judgment had been assigned to one McMeakin, and he was included as a party in the proceedings in error, and the right to a dismissal on motion was recognized. In this case the mistake of joining Dey and Street and C. S. Kinney in the appellate proceedings is plainer. They are not parties to the judgment below and are not interested in the event of this appeal and are not proper parties to the appellate proceedings.

The value of the interest of neither of the appellants, excepting Mistress Sipperley, equals the jurisdictional amount. But it is submitted that the above objections of non-joinder and misjoinder of parties apply alike to all the appellants irrespective of the value or amount of their interests involved, and that the appeal of all the appellants ought to be dismissed.

2. If, however, this honorable Court should be of opinion that it has jurisdiction to entertain the appeal, then it is respectfully submitted that the questions involved in the record are so manifestly frivolous as to indicate that the appeal was taken for delay only.

The statutes of Utah provide as follows:

SEC. 2471. "The assignment of any partner in trade, made to secure or satisfy a creditor of such firm, shall be deemed valid in law."

SEC. 2472. "This act shall not be so construed as to authorize the assignment of any of the effects of such copartnership to satisfy the individual claim of any of the parties, or other than such debts as are incurred for the effects or proceeds thereof thus assigned."

SEC. 2838, p. 154. "Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods or things in action, or of rents or profits issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents or profits thereof, made with the intent to delay, hinder, or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts, or demands, and every bond or other evidence of debt given, suits commenced, decree or judgment suffered with the like intent as against the person hindered, delayed, or defrauded, shall be void."

The plaintiff may have the property of a defendant attached for debts not due in cases where the defendant has assigned, disposed of, or concealed any of his property with intent to defraud his creditors.

Sec. 3308, Com. L. Utah, vol. 2, p. 266, 267.

The decision of the court below accords with the policy of the statutes of Utah and would seem to be the only decision that the law, and the facts disclosed by the record, justify.

JAMES H. [illegible]

185-86

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1894.

No. ~~1166.~~ 688

THE LAW ASSOCIATION OF PHILADELPHIA

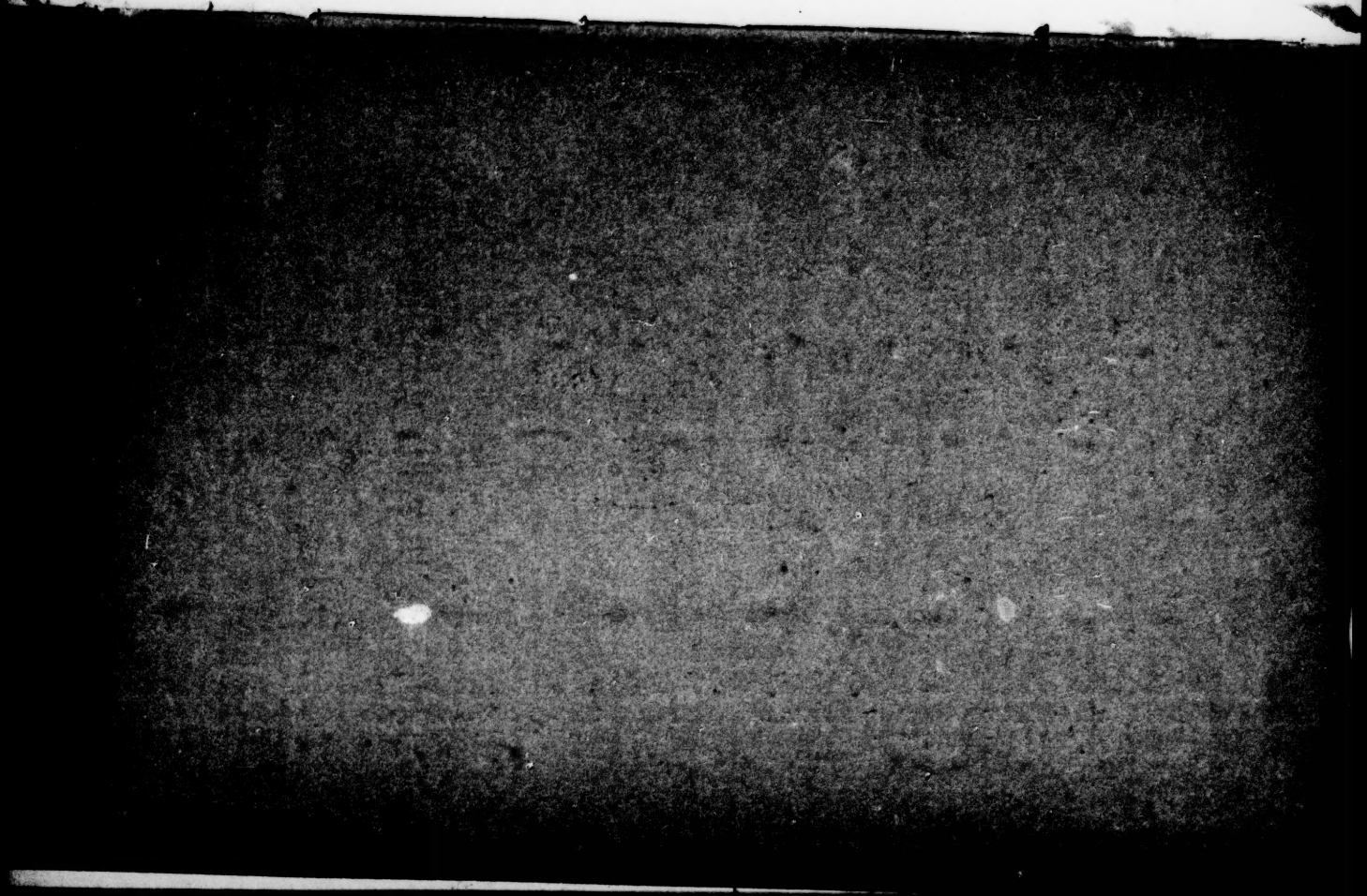
MRS. A F. SIPPERLEY, MRS. E. J. WELLING, H. A. LEE AND THE UNION NATIONAL BANK OF GREELEY, COLORADO,
Appellants,

vs.

JOHN O. SMITH, GEORGE WHITING, CHARLES F. CONNOR AND GEORGE S. SMITH,
Respondents.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

Reply Brief, to Motion to Dismiss or Affirm.



Supreme Court of the United States,

OCTOBER TERM, 1894.

No. 1186.

MRS. A F. SIPPERLEY, MRS. E J. WELLING, H. A. LEE AND THE UNION NATIONAL BANK OF GREELEY, COLORADO,
Appellants,

vs.

JOHN O. SMITH, GEORGE WHITING, CHARLES F. CONNOR AND GEORGE S. SMITH,
Respondents.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

Reply Brief, to Motion to Dismiss or Affirm.

The notice served upon the counsel for the appellants is two-fold. The motion to dismiss the appeal is:

First. Because of the non-joinder in the appeal of A. F. Sipperly and H. S. Lee, and;

Second. Because of the mis-joinder of Messrs. Dey & Street and C. S. Kinney.

Third. If the motion to dismiss the appeal is not sustained, the Court is asked to affirm the judgment of the Court below, because the "questions involved in said appeal are frivolous and that the appeal was taken for delay."

I suppose that it is incumbent upon the counsel for the appellants to treat these motions seriously, because they are made by counsel having the right to practice at the bar of this Court.

First, as to the motion to dismiss the appeal, I reply:

That this appeal is prosecuted by parties whose debts were secured by the assignment set out in the record. Sipperly & Lee, who made the assignment, were sued by Smith and others, and the goods assigned were attached, and then my clients—the appellants—intervened in that suit and claimed the benefit of the assignment and asked the Court to decree that the proceeds should be applied to the payment of their debts.

Under this state of the pleadings the litigation became, and was, wholly between the original plaintiffs, Smith and others and the intervenors, Mrs. A. F. Sipperly and others.

The decree of the District Court was against the intervenors. They appealed to the Supreme Court of the Territory, where the decree of the District Court was affirmed, from which this appeal is prosecuted.

Sipperly & Lee did not appeal from the decree of the District Court, and were not before the Supreme Court of the Territory and hence could not appeal to this Court nor be joined as appellees, even if they had any interest in the litigation. They have submitted to the decree of the District Court as far as they are concerned, and have made no complaint concerning its correctness.

One of the very cases cited by the counsel for the appellees in this case, viz. Davis vs. the Mercantile Trust Co, 152 U. S 953, it seems to me, is decisive of this question in my favor. Counsel, in his brief, quotes from that case as follows:

"That all the parties to the record who appear to have any interest in the order or ruling challenged, must be given an opportunity to be heard on such an appeal."

It is apparent that Sipperly & Lee have no interest in the order or ruling challenged here, for they have made a conveyance of the property, securing certain debts, and the litigation in this case is between the attaching creditors and the persons whose debts were secured by the consignment, viz., these appellants.

The only ground that a motion to dismiss could be put with any plausibility, would be a want of sufficient value as to a part of the appellants.

The claim of the appellant, Mrs. Sipperly, is $4,800 with interest at six per cent, due from March, 1887; and was, at the time the appeal was taken, much beyond $5,000. This would sustain her appeal. But as I have called the attention of the Court to this,

I desire to say that I think this is a case where the sum or value in dispute should be considered as the gross amount claimed by all the appellants.

The claim of the appellants is under the assignment as such, and the claim is joint and comes under the class of appeals mentioned in the opinion of Justice Gray, in the case of Gibson vs. Shufeldt, 122 U. S., 30, as follows:

"That when property or money is claimed by several persons, suing together, the test is whether they claim it under one common right, the adverse party having no interest in its apportionment or distribution among them."

It seems to me that all these appellants here claim under one common right, viz. the assignment, and that certainly the appellees have no interest whatever in the manner or distribution of the fund, if the appellants should succeed.

The case of the Connemara, reported in 103 U. S., 754, it seems to me, is quite analogous to my case. I also cite

Shields vs. Thomas, 17 How., 3.
Market Co. vs Hoffman, 101 U. S., 112.
The Mamie, 105 U. S., 773.
Davis vs. Corbin, 112 U. S., 36.
Estes vs. Gunter, 121 U. S., 183.
Handly vs. Stutez, 137 U. S, 366.
Also Foster's Federal Practice, Vol. 2, Sec. 381, 1028, where it is said:

"Where a number of plaintiffs claiming under the same title and having a common interest in the relief sought, unite in a suit, the adverse party having no interest in the apportionment or distribution of the amount recovered among them, their united interests constitute the matter in dispute."

I respectfully submit that this is my case.

Second. As to the second cause alleged for the dismissal of the appeal, I desire to suggest to the learned counsel for the appellees that if he will examine the citations in the many appeals and writs of error now pending in this Court, I doubt if he will find a single one that is not directed to the attorneys of the appellees in conjunction with their clients; certainly such is the case with all appeals from the Territory of Utah.

II.

The counsel for the appellees, after affirming that the appeal is frivolous and for delay, proceeds to argue at length the merits of the case. I suppose I must meet this in like manner.

While there are incidental questions to be considered on the merits of this appeal, the main one may be fairly stated thus: Can an insolvent partnership by assignment appropriate the partnership assets to the payment of debts due from the individual members of the firm, to the exclusion of the partnership creditors?

The intervening complaint of these appellants sets up the assignment of Sipperley & Lee and claims the benefit under it.

The answer of Smith et al. denies its validity upon one distinct ground and no other. I quote from it at paragraph 6 and page 5 of the transcript:

6. "Plaintiffs further allege that said assignment included only the partnership assets of said firm of A. F. Sipperly & Co., and was made by said Sipperly and said Lee as co-partners as aforesaid for the purpose and with the intention of hindering, delaying and defrauding said plaintiffs and all other unpreferred creditors of said firm, and that said pretended assignment was and is absolutely void as against the plaintiffs herein and all other creditors of said firm who have repudiated the same, in that, said firm being insolvent in and by said pretended assignment attempted to appropriate firm assets to pay individual debts of the respective partners described in Schedule "B" of said partnership, and that said debts were not and never were debts of said partnership."

The thirteenth finding of fact in page 11, as amended and certified to this Court at page 17 of the Transcript, is as follows:

"That said assignment was made by said defendants, A. F. Sipperly and H. S. Lee to Frank W. Ross, with intent to hinder, delay and defraud their creditors, by preferring the debts due to members of the families of the assignors, and due from them individually, and not as partners, which debts were the sole capital of the assignors in the partnership, and which debts had been concealed from the knowledge of the creditors of the firm, over debts due partnership creditors, and directing that they be paid out of the firm's assets, to the exclusion of the creditors of the firm."

Leaving out certain words, which are clearly parenthetical and do not concern this immediate question, the finding would be as follows:

"That said assignment was made by said defendants, A. F. Sipperly and H. S. Lee, to Frank W. Ross with intent to hinder, delay and defraud their creditors by preferring the debts due to members of the families of the assignors and due from them individually and not as partners, * * * * * and directing that they be paid out of the firm's assets to the exclusion of the creditors of the firm."

From this it will be seen that the Supreme Court of Utah adjudged the assignment to be void, because it preferred the debts due to members of the families of the assignors and due from them individually and not as partners and directing that they be paid out of the firm's assets to the exclusion of the creditors of the firm.

In short the Court answered my question above put in the negative.

The assignment of errors is as follows: Trans. page 18.

I

"Said Court erred in adjudging that the assignment mentioned in the complaint of the intervenors, being the one executed by A F. Sipperly & Co. to F. W. Ross, as assignee, and set forth in the findings of fact, is fraudulent and void."

II

"Said Court erred in affirming the judgment of the trial court, because the facts as found by said Supreme Court do not justify or support the judgment affirmed."

Did the Court err as alleged?

Let it be conceded in the broadest manner that the partnership was insolvent, that some of the debts—the larger ones—were due to members of the family of the partners. And then I assert in the strongest manner that the *jus disponendi* still existed, and if both members of the firm, or one with the consent of the other, while the partnership was still in existence and its assets under their control, saw proper to so dispose of them, they had the right to do so, and no creditor of the firm has any legal cause to complain.

The distinct rulings of this Court are to this effect:

Case vs. Beauregard, 99 U. S., 119.
Fitzpatrick vs. Flannagan, 106 U. S, 654.
Huiscamp vs. Moline Wagon Co., 121 U. S, 322.

To undertake to enlarge upon these cases would be a presumption that I shall not indulge in.

III

There is no finding of fact upon which the Court below could have possibly based its judgment, except the 13th. If it cannot be sustained on that finding, it must be reversed.

While the findings show that the firm of Sipperly & Lee was insolvent, and that the fact that the firm owed these debts was concealed by the members of the firm from their creditors, there is no intimation in any finding that these appellants had any knowledge of this state of things. But suppose these facts had been known to the appellants, the case would not be helped.

In the case of Huiskamp vs. Moline Wagon Co., 121 U. S., 319, this Court says:

"A debtor in failing circumstances, having the right to prefer a creditor—if the preferred creditor has a *bona fide* debt, and takes a mortgage with the intent of securing such debt, and not with the purpose of aiding the debtor to hinder and delay other creditors, the mortgage is valid, even though the mortgagee knows that the debtor is insolvent and that the debtor's intention is to hinder and delay other creditors."

It is not intimated in any finding that the preferred creditors even knew of the insolvency of the debtors here, much less accepted the benefit of the assignment for the purpose of aiding the debtor to hinder and delay other creditors.

There is another view of the case which may be suggested here, and that is, that it is nowhere in any finding of fact stated that the assignee, Frank W Ross, or the preferred creditors, had any notice of the fraudulent intent of the members of the firm, if there was any such. In the case of Emerson vs. Senter, 118 U. S., p. 3, this Court held as follows: "It is, however, contended that the assignment in question was void because of fraudulent omissions from the schedule by Moores of certain property, which constituted a part of the partnership assets, and was appropriated by him to his own use.

"But this fraud upon the part of Moores did not affect the rights of the assignee and of beneficiaries of the trust who were ignorant of the fraud of the grantor."

Further on in the opinion quoting from the case of Hempstead vs. Johnston, decided by the Supreme Court of Arkansas, this language is used:

"And even if Cornish, the grantor, had the purpose when he made the deed of hindering and delaying creditors, not provided for by it, yet if the preferred creditors were not privy to this fraudulent purpose, but accepted the deed in good faith to secure the debts really due them, it would be valid as to them."

And after citing other cases decided by the Supreme Court of Arkansas, this Court uses the following language:

"The rule announced by the Supreme Court of Arkansas, is in harmony with the settled doctrine of this Court, and accords with sound reason."

When this Court shall come to try this case upon its merits, I believe it will not only come to the conclusion that the questions upon this appeal are not "frivolous," but will reverse the judgment of the Court below, and direct judgment to be rendered for the intervenors.

J. W. JUDD,
Attorney for Appellants.

Service of copies of the foregoing brief accepted this ..... day of ....., 1894.

.....

Attorney for Appellees.